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**OFFICE OF PETITIONS**

In re Application of	:
Francis X. McKeen	: DECISION ON PETITION
Application No. 09/672,368	: AND NOTICE OF ABANDONMENT
Filed: 28 September, 2000	:
Attorney Docket No. 042390.P9575	:

This is a decision on the petition filed on 15 November, 2001, styled under 37 CFR 1.182, which is treated as a petition under 37 CFR 1.181 to withdraw the holding of abandonment of above-identified application.

The petition is **DISMISSED**.

The application is **ABANDONED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition to Withdraw the Holding of Abandonment" or as described below, under 37 CFR 1.137(b). This is not a final agency action.

The instant application became abandoned on 18 January, 2001, for failure to timely reply to the Notice to File Missing Parts mailed on 17 November, 2000, which set a two (2) month period for reply. The filing of the present petition precedes the mailing of a Notice of Abandonment.

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Petitioner asserts, *inter alia*, that the Notice to File Missing Parts was never received. An allegation that an Office action was not received may be considered as a petition for the withdrawal of the holding of abandonment. If the allegation is adequately supported, the petition may be granted and a new Office action mailed. The petition should include sufficient data describing the procedures and controls utilized by the addressee when correspondence is received from the U.S. Patent and Trademark Office. If possible, the addressee should also point out how these procedures and controls were followed in the situation at hand.

The showing of record is not sufficient to withdraw the holding of abandonment.

A review of the written record indicates not irregularity in the mailing of either of the aforementioned communications, and in the absence of any irregularity there is a strong presumption that the communications were properly mailed to the applicant at the correspondence address of record. This presumption may be overcome by a showing that the aforementioned communication was not in fact received. The showing required to establish the failure to receive an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.<sup>1</sup> The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office communication may have been lost after receipt rather than a conclusion that the Office communication was lost in the mail.

The petitioner has not submitted a statement from the practitioner attesting to the fact that a search of the file jacket and docket records indicates that the Notice to File Missing Parts was not received. Additionally, there are no copies of docket records where the non-received Office communication would have been entered had it been received and docketed attached to, and referenced in petitioner's statement.

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<sup>1</sup>MPEP 711.03(c). See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions are not Received," 1156 O.G. 53 (November 16, 1993).

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If petitioner cannot make the required showing, or is otherwise unsuccessful in getting the holding of abandonment withdrawn, petitioner may wish to consider filing a petition under 37 CFR 1.137(b).<sup>2</sup> The appropriate form for filing this petition PTO/SB/64 has been included with this decision.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner of Patents and Trademarks  
Box DAC  
Washington, D.C. 20231

By FAX: (703) 308-6916  
Attn: Office of Petitions

By hand: Crystal Plaza Four, Suite CP4-3C23  
2201 South Clark Place  
Arlington, VA 22202

Receipt of the declaration filed with the present petition is acknowledged. The late filing surcharge of \$130.00 will be charged to counsel's deposit account, No. 02-2666, as authorized on the fee transmittal sheet filed with the present petition.

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<sup>2</sup>Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

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Telephone inquiries concerning this matter may be directed to the undersigned at (703) 308-6918.



Douglas I. Wood  
Petitions Attorney  
Office of Petitions  
Office of the Deputy Commissioner  
for Patent Examination Policy

Enclosures: Form PTO/SB/64 (Petition to Revive--Unintentional)